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No. 94-1327

In the
Supreme Court of the United States
October Term, 1994

DEANNA BRAYTON,

Petitioner,

vs.

CITY OF NEW BRIGHTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 9-040 of the New Brighton Code of Ordinances, as amended, permits one non-commercial sign per residential property at any time, plus an additional number of non-commercial signs per residential property for a temporary period before and after any election.

1. Is Section 9-040 of the New Brighton Code of Ordinances a content-neutral time, place and manner restriction of speech?

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No. 94-1327

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

DeAnna Brayton,

Petitioner,

vs.

City of New Brighton,

Respondent.

On Petition For Writ Of Certiorari
To The Minnesota Court of Appeals

BRIEF IN OPPOSITION

The Respondent City of New Brighton ("City") respectfully requests that the Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the decision of the Minnesota Court of Appeals in this case. The opinion of the Minnesota Court of Appeals is reported as Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994) and is reproduced in the appendix to the Petition (hereinafter "Pet. App.") at pages 1a to 12a. The Minnesota Supreme Court's order denying review is reproduced at Pet. App., 13a. The Petition should be denied because the Minnesota Court of Appeals opinion does not

conflict with the decisions of this Court, the United States Courts of Appeals, or the courts of last resort of other states.

STATEMENT OF THE CASE

Petitioner, a resident of the City, contends that Section 9-040 of the City's sign ordinance, as amended by an ordinance adopted in October 1991, is a facially unconstitutional restriction of her rights under the First Amendment to the United States Constitution. The City adopted its sign ordinance in order to preserve the residential character of residential neighborhoods, avoid clutter and litter, protect property values, reduce traffic hazards, and to accomplish other governmental interests as recited in the ordinance. Pet. App. 22a. To accomplish these ends, the ordinance contains a general prohibition against posting any sign, without first obtaining a permit. New Brighton Code § 9-020(a), at Pet. App. 22a. Section 9-040 of the Code excepts certain signs from the permit requirement, including non-commercial opinion signs[1] on residential properties. New Brighton Code § 9-040(c)(8) and (c)(16), at Pet. App. 24a and 25a.

The parties agree that, as amended, Section 9-040 permits a resident to post one non-commercial opinion sign on residential property at any time, whether the sign carries a political or other non-commercial message. Pet. App. 3a. The ordinance also allows additional noncommercial signs to be posted on any

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[1] Section 9-030 of the New Brighton Code defines a non-commercial opinion sign as a sign "which does not advertise products, goods, businesses or services and which expresses an opinion or other point of view." Pet. App. 23a. The parties agree that this definition encompasses both ideological/opinion and political/campaign speech. Pet. App. 3a.

property for temporary periods before and after elections.[2] Pet. App. 24a.

The durational period for the additional non-commercial signs varies in even-numbered and odd-numbered years. In even-numbered years, when state, federal, county and school district elections are held, and by operation of Minnesota Statutes, Section 211B.045, the durational limit for additional non-commercial signs is from August 1 until 10 days after the election. In odd-numbered years, when only city and school district elections are held, the durational limit is the later of the last day of candidacy filing or one month before the election until 5 days after the election. New Brighton Code § 9-040(c)(8), at Pet. App. 24a. The number of additional signs allowed is determined by the number of candidates or issues on the election ballot. Id. The additional signs may be devoted to any form of non-commercial speech, including opinion speech. Id.

Other signs are also exempted from the ordinance's permit requirement, including "for sale" and "for rent" signs, gasoline service station signs, and other signs. New Brighton Code § 9-040(b) and (c), at Pet. App. 23a - 24a. As explained in the following section of this brief, the City's sign ordinance does not allow any commercial or non-commercial speech sign in greater numbers or for greater duration on residential properties than the "non-commercial opinion sign" allowed under Sections 9-040(c)(8) and (c)(16).

Petitioner contends that the City's ordinance is unconstitutional because it prevents her from posting more than one sign on her property for a portion of each year. The only

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[2] Petitioner concedes that the additional signs may be devoted to any non-commercial speech, including opinion or political speech. Petition, page 3. However, in the "Questions Presented" section of her Petition, the Petitioner mischaracterizes the ordinance as allowing additional political campaign signs only, and not other non-commercial speech signs.

evidence that Petitioner introduced on the impact of the ordinance on her ability to speak was her statement:

> Putting up signs in my yard is the only practical way I have to inform people about the cruelty with which animals are treated by humans. I could not afford either the money and the time to make up and distribute flyers, or to canvass, or to advertise. I do go to city council meetings, but am permitted to speak for only a very limited period.

Affidavit of DeAnna Brayton, ¶ 6, at Respondent's Appendix, page 2 (hereinafter referred to as "A-2"). The Petitioner introduced no evidence that her ability to communicate her views would be substantially impaired by an ordinance that allows her to place one sign on her property at any time and further allows her to place an additional number of signs on her property for temporary periods.

REASONS FOR DENYING THE PETITION

The Court should exercise its discretion by not granting the Petition because there are no "special and important reasons" for granting it. Sup. Ct. R. 10.1. The Minnesota Court of Appeals decision neither conflicts with a decision from this Court nor with decisions on the same matter by other United States Courts of Appeals or state courts of last resort. Id. 10.1(b) and (c). Because the case does not meet the standards established by the Court for granting review on Writ of Certiorari, the Petition should be denied.

I. THE CITY'S ORDINANCE IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN CITY OF LADUE V. GILLEO.

The Minnesota Court of Appeals held that the City's ordinance is "decidedly content neutral." Pet. App. 8a. Petitioner argues that, even if the City's ordinance is content-neutral, the ordinance is inconsistent with this Court's decision in City of Ladue v. Gilleo, 512 U.S. ___, 114 S. Ct. 2038 (1994). Petition, p. 8. The Petitioner's argument is unfounded, because, in contrast to the ordinance in City of Ladue, the City's ordinance does not "prohibit too much protected speech." Id. at 2043.

In City of Ladue, this Court appropriately recognized that even a content-neutral regulation may violate the First Amendment where it "foreclose[s] an entire medium of expression" and "totally foreclose[s] that medium to political, religious or personal messages." Id. at 2045. The City's ordinance is distinguishable from the ordinance in City of Ladue because it neither bans an entire medium of expression nor does it ban any particular category of speech. Under this Court's decisions, this distinction is significant, because "laws regulating the time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." Linmark Associates, Inc. v. Willingboro, 431 U.S 85, 93 (1977). In the City of Ladue opinion itself, this Court contrasted that city's total prohibition on residential signs with "regulations short of a ban." 114 S. Ct. at 2047, n. 17.

Unlike the ordinance in City of Ladue, the City's ordinance preserves the ability of its residents to speak from their properties, year-round, on any subject of the residents' choice. At the same time, the ordinance imposes reasonable numerical, durational, and size limitations to "address the ills ... associated with residential signs." Id.

By allowing residents to speak year-round from their properties on any subject of the residents' choice, the City's ordinance comports with this Court's decision in City of Ladue. The ordinance does not "prohibit too much protected speech."

Petitioner urges this Court to grant further review on the ground that a one-sign numerical limit is only "incrementally better than the outright ban addressed in City of Ladue . . ." Petition, pp. 8-9. There are two problems with this argument.

First, the Petitioner's argument is founded upon a mischaracterization of the ordinance. The City's ordinance does not restrict non-commercial speech to one sign per residence. The ordinance allows one non-commercial sign per property for part of the year, and temporarily allows additional non-commercial signs for a portion of each year. Petitioner's reliance on Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993) is therefore misplaced. The Arlington County court struck down an ordinance that allowed only two political campaign signs for a temporary, 80-day period. That ordinance stands in stark contrast to the City's ordinance, which permits non-commercial speech at any time of the year.

Moreover, so far as the City can determine, no state or federal court has ever held unconstitutional an ordinance like the City's. Indeed, in Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972), the court upheld an ordinance similar to the City's that allowed a political sign to be posted any time during the year and allowed additional, temporary political signs for 60 days preceding and 10 days following an election.

The second flaw in the Petitioner's argument is that it is in reality an invitation to this Court to assign a numerical quantifier to First Amendment rights. Petitioner contends that one sign is not enough without any evidence that a one-sign limitation, plus a substantially greater number during a portion of the year, prevents her from communicating her ideas to the desired audience. Petitioner argues that "displaying multiple signs conveys a

heightened level of engagement and concern about the community." Petition, p. 9 n. 1. The same could be said of posting signs that are 100 square feet in size, yet courts have uniformly held that ordinances imposing reasonable size limitations are constitutional. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), cert. denied sub nom Leipzig v. Baldwin, 431 U.S. 913 (1977).

Petitioner's numerical approach to her First Amendment rights not only trivializes those rights, but it ignores the fundamental questions raised in First Amendment case law. Does the ordinance provide the Petitioner the opportunity to speak from her home? The answer is yes. Does the ordinance provide any greater opportunity for speakers with other commercial or non-commercial messages? As discussed below, the answer is no.

III. THE CITY'S ORDINANCE IS A CONTENT-NEUTRAL TIME, PLACE AND MANNER REGULATION.

The City's sign ordinance satisfies this Court's requirements for a content-neutral time, place and manner regulation. Petitioner contends that the ordinance is content-based, in two ways: (1) the ordinance favors political campaign speech over her ideological speech; and (2) the ordinance favors other categories of speech over her ideological speech. Those assertions are unfounded.

In her Petition, the Petitioner persistently misrepresents to this Court the provisions of the City's ordinance. At page 12 of the Petition, for example, the Petitioner asserts that the ordinance permits "virtually as many campaign signs as any resident would ever want to display, while according no such advantage to signs concerning non-campaign topics." This statement is patently false, as can be seen at pages 3 and 4 of the Petition, where Petitioner acknowledges that the ordinance allows residents to

display either non-commercial opinion signs or political campaign signs, subject to the numerical limits established in Sections 9-040(c)(8) and (16).

The City's ordinance treats political speech and opinion speech identically. During most of the year, a residential property owner may post one non-commercial sign per frontage on her yard that may be used to express any opinion or point of view, including support for a political candidate. New Brighton Code § 9-040(c)(16), at Pet. App. 25a. During election seasons a property owner may post additional signs (up to one sign per candidate or ballot issue, per street frontage), any of which may be devoted to any campaign or opinion message. New Brighton Code § 9-104(c)(8), at Pet. App. 24a.

The temporary expansion of the numerical limit on campaign and opinion signs during the election season does not make the ordinance content-based. Petitioner has not cited, and the City has not found, any case where a court held a sign ordinance like the City's to be content-based. To the contrary, state and federal court decisions support the ordinance's provision that allows a greater quantity of speech during the election season. Fisher v. City of Charleston, 188 W. Va. 518, 425 S.E.2d 194 (1992)(endorsing the use of durational limits on political campaign signs); Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993)(invalidating ordinance because of numerical limit on temporary campaign signs but approving 80-day durational limit); Baldwin v. Redwood City, supra (approving 70-day durational limit on political signs).

Rather than displaying a preference for political speech, the City's temporary expansion in the numerical limit only recognizes the increased number of speakers during an election season. Accord Arlington County, 983 F.2d at 595 (campaign sign regulation affects two groups of speakers: the homeowner and the candidates). In order to provide opportunity for the additional

speakers to communicate their messages, the numerical limit is temporarily increased for all types of non-commercial signs, including campaign and opinion signs. At all times of the year, political and ideological speech are treated identically under the ordinance.

Because the ordinance accords equal treatment to political and ideological speech, the ordinance does not violate this Court's proscription against treating some types of non-commercial speech more favorably than others. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981). In holding that the numerical limitations in the sign ordinance do not render the ordinance content-based, the Minnesota Court of Appeals decision is consistent with the decisions of this Court.

Petitioner contends, incorrectly, that the City's ordinance treats other speech more favorably than campaign and opinion speech by setting less restrictive durational and numerical limits on those categories of speech. Petition, p. 14. That assertion is based upon a misunderstanding of the ordinance.

The ordinance allows one opinion or campaign sign year round, plus an additional number of opinion or campaign signs for a temporary period during election seasons. The durational limit on the expanded number of signs is August 1 until 10 days after the election in even years and approximately 40 days in odd-numbered years. As discussed below, no other residential sign is accorded more favorable treatment than noncommercial opinion or campaign signs.

First, petitioner misleadingly compares the limits for noncommercial opinion and campaign signs, which are posted on residential property, to limits for signs that are not allowed on residential property. Mattila Supp. Aff., ¶ 5, at A-4. Since those signs are not found on residential property, it is misleading to assert that those signs receive more favorable treatment than opinion and campaign signs on residential properties. The signs that are not found on residential properties include gasoline

service station signs, civic celebration signs, traffic signs, historical markers, and government information signs. Id.

When opinion and campaign signs are compared to other signs allowed on residential properties, it is apparent that the ordinance does not invert First Amendment values. The ordinance allows one non-commercial sign throughout the year and a significantly greater number on a temporary basis. No commercial sign is allowed in such great numbers over the entire year. See, e.g., New Brighton Code § 9-040(c)(7) (garage sale and real estate sale signs limited to one per frontage for temporary period); § 9-040(c)(9) ("for sale" sign limited to one per property); § 9-040(c)(10) (one construction identification sign per property, duration limited to actual construction). Mattila Supp. Aff., ¶ 6, at A-5.

Similarly, other non-commercial signs are treated no more favorably than opinion and campaign signs. For example, holiday decorations are allowed for a temporary period, but one opinion or campaign sign is allowed year round. Pet. App. 25a. Likewise, the lack of durational limits on a nameplate sign or a "no trespassing" sign does not offend the constitution, because the ordinance also allows one non-commercial opinion or campaign sign year round.

To the extent that any minor differences exist, the Petitioner's comparisons of opinion and campaign signs to other non-commercial signs amount to nitpicking. "[D]istinctions in degree become significant only when they can be said to amount to differences in kind." Baldwin, 540 F.2d at 1369, quoting Buckley v. Valeo, 424 U.S. 1, 30 (1976). Petitioner cannot seriously contend that the ordinance's treatment of "no trespassing" signs and cornerstones is an attempt to "choose the appropriate subjects for public discourse." Cf. Metromedia, 453 U.S. at 515.

Under any fair reading, the ordinance places the highest value on political and opinion speech, and the ordinance reflects the value placed on this speech by the First Amendment. The ordinance does not invert First Amendment values and satisfies the Metromedia tests for a content-neutral time, place and manner regulation of speech.[3]

CONCLUSION

Petitioner has failed to show why this Court should exercise its direction to review the Minnesota Court of Appeals decision upholding the constitutionality of the City's sign ordinance. Accordingly, the City respectfully requests that the Petition be denied.

Dated: March 1, 1995.

Respectfully submitted,

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(612) 337-9300

Attorney for Respondent

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[3] Although the Minnesota Court of Appeals also addressed the narrow tailoring and alternative channels of communications issues, the Petitioner has not raised those issues as a basis for this Court to grant certiorari. Consequently, the City does not address those issues in this brief.

APPENDIX

Affidavit of DeAnna Brayton A-1

Supplemental Affidavit of Erny Mattila A-3

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Other Civil

DeAnna Brayton Court File No. C7-93-2677

Plaintiff,

vs. **AFFIDAVIT OF DEANNA BRAYTON**

City of New Brighton,

Defendant.

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

DeAnna Brayton, being first duly sworn, on oath states as follows:

1. I am the plaintiff in the above-captioned matter. I live with my family at 1540 Mississippi Street in New Brighton.

2. In March of 1991, I put up two small signs in my front yard, concerning a decision made by a Nicollet County District Court judge in an animal cruelty case and stating my objections to the cruel treatment of animals.

3. I received a letter early in April, 1991, from Erny Mattila, the city planner. He told me about the city's sign

ordinance and said I had to take my signs down within a week, or I could be prosecuted. I did so.

4. After I complained about the ordinance with the assistance of the Minnesota Civil Liberties Union, the city council considered and adopted certain amendments. Several residents showed up at the council meeting to express their disapproval of my signs and oppose any amendments to the sign code.

5. In the fall of 1992, I put some political campaign signs up in my yard. I left one of them up after the election was over. Eric D. Schneider, community development assistant for the city, wrote me on November 24, 1992 to tell me that this violated the ordinance, and I had to take it down. Before I could react, the sign was stolen. I did not erect another.

6. Putting up signs in my yard is the only practical way I have to inform people about the cruelty with which animals are treated by humans. I could not afford either the money and the time to make up and distribute flyers, or to canvass, or to advertise. I do go to city council meetings, but am permitted to speak for only a very limited period.

FURTHER YOUR AFFIANT SAITH NOT.

/s/_____
DeAnna Brayton

Subscribed and sworn to before
me on this ____ day of July, 1993.

_____
Notary Public

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil

DeAnna Brayton, Plaintiff, vs. City of New Brighton, Defendant.	**SUPPLEMENTAL AFFIDAVIT OF ERNY MATTILA** File No. C7-93-2677

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

ERNY MATTILA, being first duly sworn on oath, states and alleges as follows:

1. This affidavit supplements my earlier affidavit dated May 27, 1993 and is made in support of the defendant City of New Brighton's motion for summary judgment.

2. I have reviewed the plaintiff's Memorandum of Law in Support of Motion for Summary Judgment. At page nine of the memorandum, the plaintiff compares several provisions of the City's sign ordinance to the durational restriction on campaign

signs. The comparison is in some places inaccurate and misleading.

3. First, plaintiff mischaracterizes the durational limit placed on campaign signs under the ordinance. As I have interpreted and enforced the ordinance, the ordinance places a durational limit only on opinion or campaign signs in excess of the one sign allowed by § 9-040(c)(16). In other words, residential property owners may post one sign per street frontage under § 9-040(c)(16), which has no durational limit. Any additional signs are allowed only during the time period specified in § 9-040(c)(8), as modified by Minn. Stat. § 211B.045.

4. Plaintiff also mischaracterizes the ordinance by stating that the temporary sign limit is 30 days. However, as I stated in my earlier affidavit, the City has interpreted and enforced the ordinance in conjunction with Minn. Stat. § 211B.045. In even-numbered years, the durational limit for the additional signs is from August 1 until 10 days after the election, by operation of § 211B.045, or roughly 100 days. In odd-numbered years, the durational limit is the later of the last day of candidacy filing or 30 days prior to the election until 10 days after the election, or roughly 40 days.

5. In addition, some of the signs listed at page nine of the plaintiff's memorandum are not allowed on residential property and cannot be fairly compared to non-commercial opinion or campaign signs that are posted on residential property. As I stated in my earlier affidavit, the character of residentially zoned properties differs significantly from that of commercial and industrial properties.

a. Under the City's zoning ordinance, gasoline service stations are not allowed in residential zoning districts. Therefore, although § 9-040(c)(11) does not express so state, by operation of other code provisions, gasoline

service station signs are permitted only in commercial districts.

b. The civic celebration signs referenced at § 9-040(b)(6) have, to my knowledge, never been posted in a residential zoning district. Historically, this provision has only been used for signs promoting the only celebrations sponsored by the City -- "Squash Festival" and "Stockyard Days," and the signs have only been allowed at busy commercial intersections in commercial zoning districts. In addition, the civic celebration signs have historically been allowed for only one to two weeks.

c. Traffic signs, historical markers, and governmental information signs, which are allowed under § 9-040(b)(7) and (c)(2) and (3), are not posted on residential properties.

6. Signs on residential properties that contain commercial speech are not treated more favorably under the ordinance than the non-commercial signs allowed under §§ 9-040(c)(8) and (16).

a. The contractor advertising which is allowed under § 9-040(c)(2) is not comparable to signs posted on residential property. That section only concerns advertising on vans and trailers which are parked at a construction site during actual construction. The principal difference with this type of sign is that it is attached to a vehicle which moves in intrastate and interstate commerce. The City's ordinance treats all movable signs similarly, regardless of sign content. (E.g., parade floats and signs on service or delivery vehicles, § 9-040(b)(1) and (4).)

b. In addition, sites under construction have a distinctly different character than residential properties, and more

akin to commercial or industrial properties. This also applies to contractor identification signs under § 9-040(c)(10). The durational limit on contractor van signs and contractor identification signs is the period of actual construction, which is less than for non-commercial opinion or political signs allowed under § 9-040(c)(16) (no durational limit).

c. The garage sale and rummage sale signs that are allowed under § 9-040(c)(7) have identical size limits as non-commercial signs but a shorter durational limit -- 8 days. Real estate sale signs (i.e., "open house" signs) are limited to 3 days. Sale of produce signs have no durational limit, which is equivalent to the limit in § 9-040(c)(8).

d. The "for sale" and "for rent" signs allowed under § 9-040(c)(9) have the same size restrictions as non-commercial signs and are limited to one per property instead of one per street frontage plus additional signs for a temporary period. In addition, the durational limit is the period during which the property is for sale or rent, which is not less restrictive than § 9-040(c)(8), which has no limit.

7. The total number of noncommercial signs allowed on residential properties varies from year to year, depending upon the number of candidates and ballot issues in that year, and depending upon whether special elections or primaries are held in addition to general elections. In my experience, however, there are generally more candidates and ballot issues during state general election or even-numbered years, which is when all federal, state and county elective offices are filled. In odd-numbered years, there are normally fewer candidates and ballot issues, because only the city and school district offices are up for election.

8. The plaintiff has suggested that the City impose a year-round limit on noncommercial signs of 5-10 signs. In my opinion, this would likely reduce the total amount of noncommercial speech allowed on residential properties, because the number of candidates and ballot issues normally exceeds five and, in state general election years, is normally many more than 10.

/s/_____
Erny Mattila

Subscribed to and sworn before me
this ____ day of _____, 1993.

_____
Notary Public